Criminal Law and Procedure

The Vienna Convention and the Supreme Court: Reaching the Limits of Internationalism?

*By Kent Scheidegger**

The Supreme Court has taken much criticism in certain circles for paying too much attention to "international opinion" in interpreting the Constitution of the United States.[1] However, in the cases on the Vienna Convention, (which really do involve international law), the High Court has been surprisingly un-swayed by international opinion. Four cases have settled on the side of domestic law enforcement—though the fifth, looming on the horizon, may prove the most difficult.

The United States ratified the Vienna Convention on Consular Relations on November 24, 1969.[2] Article 36 of the treaty provides:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State: ... ¶ (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner.... The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph; ...
>
> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Despite imposing a new obligation on arresting law enforcement agencies, this provision went nearly unnoticed in American criminal law for a quarter century. A 1995 law review article states: "[T]he only reported case on the application of Article 36 of the Vienna Convention, did not involve a criminal arrest, but instead concerned the detention of a foreigner whose immigration status was irregular."[3] After all, the Sixth Amendment and the *Miranda* rule already gave a right to counsel at trial and before questioning, and a notification of that right.[4] Thus, although the obligation to "inform the person concerned" was frequently ignored in the United States, as in other countries, neither the defense bar nor foreign governments showed much interest.[5] All that changed in the 1990s. The fact that most of the foreign-national murderers on death row in the United States had not been informed of their consular-notification rights upon arrest was seen as reason to prevent their execution. Not only did convicted murderers and their attorneys seize on this argument, but so did their home countries—which joined the fray.

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Breard, LaGrand, and Procedural Default

Using the Vienna Convention in this manner had a problem that may be said common to novel arguments. A basic rule of American criminal procedure requires that most objections be raised in the trial court, and an objection is typically defaulted if not raised at the proper time. This is true of constitutional requirements as well as those based on statutes and rules of court.[6] In federal habeas corpus proceedings, the Supreme Court has created two exceptions through which a defaulted claim may be considered. One requires a showing of good cause for the default and resulting prejudice from the violation.[7] The other requires a compelling showing that the prisoner is actually innocent of the crime, which is extremely rare in any capital case that has progressed to the federal habeas stage.[8]

As the Supreme Court was shaping the procedural default rule, it noted that the rule operates in conjunction with the right to effective counsel.[9] If an error really does go to the fundamental fairness of a trial, an effective lawyer will object, and there will be no default. If the lawyer is ineffective, that ineffectiveness is both an independent claim for relief and "cause" for the default, opening the door to federal habeas relief. In this way, the procedural default rule operates as a filter, cutting off borderline claims raised late in the process but keeping relief available for fundamental ones.

The first Vienna Convention case to come to the Supreme Court was that of Angel Francisco Breard. In 1992, Breard left the house armed with a knife, and found Ruth Dickie, a thirty-nine-year-old woman who lived alone in an apartment in Arlington, Virginia. There Breard raped her and stabbed her five times in the neck. Guilt of the crime was proven conclusively by DNA, forensic evidence, and his confession.[10]

On appeal to the Virginia Supreme Court and in a subsequent state habeas petition, Breard made no mention of the Vienna Convention. He raised the issue for the first time on the third review of his case, a habeas petition in federal district court, claiming his rights were violated because the arresting authorities did not inform him of his right to have the Paraguayan Consulate notified.[11] The district court dismissed the claim as procedurally defaulted, and the Fourth Circuit affirmed. Paraguay and its official meanwhile initiated a flurry of litigation in the federal district court, in the International Court of Justice (ICJ), and in the Supreme Court under original jurisdiction.[12] The ICJ issued an order requesting the United States to take measures to ensure that Breard was not executed pending proceedings.

The case came to the Supreme Court on the eve of execution, with a request for stay of execution. Both Breard and Paraguay took the position that the Vienna Convention trumps the procedural default rule because it is the "supreme law of the land."[13] Given the long-established rule that rights under

the Constitution itself can be defaulted if not timely raised, the Court had little difficulty dispatching the argument that the Supremacy Clause somehow made treaty rights immune from default.[14] Further, the Court noted that the principle of harmless error would also apply. Even a clear violation of a right is generally not a ground for reversal of a judgment unless it causes some harm, i.e., may have had an effect on the outcome. Vienna Convention claims are no different.

On the question of who would ultimately decide procedural default issues, the Supreme Court made clear that it would. The High Court would give the opinion of the ICJ "respectful consideration," but treaty rights must be invoked in accordance with the procedure of the forum state under both general principles and Article 36(2) of the Vienna Convention itself, and the Supreme Court, not the ICJ, would decide those questions to the extent they involved federal law.[15]

The opinion ends with a curious mix of Executive-Judicial and federal-state separation of powers issues—a mixture that will probably come back to the Court soon. As a result of diplomatic discussions with Paraguay, the Secretary of State requested the Governor of Virginia stay execution. The Supreme Court replied, so is the Governor's prerogative.[16] Had the Executive done more than request, a different issue would have been presented—the primacy of the Executive in foreign relations. As it was, the Governor denied the request and the stay, and Breard was executed. Paraguay dropped its ICJ case.[17]

The next case would actually result in an ICJ decision. Brothers Karl and Walter LaGrand attempted to rob the Valley National Bank in Marana, Arizona, on January 7, 1982. They bound and gagged the manager, Ken Hartsock, and another employee, Dawn Lopez. Later, they stabbed both. Guilt was proven by the surviving victim's testimony, the license number of their car, Karl's fingerprint inside the bank, and both brothers' confessions. The Arizona Supreme Court affirmed in 1987. The appeal made no mention of the Vienna Convention.[18] The LaGrands first contacted the German Consulate in 1992, having learned about the Vienna Convention from an independent source.[19] For the next seven years, Germany assisted the LaGrands but filed no action on its own behalf in any American or international court. State review of the case had been completed by 1992, so the Vienna Convention claim was raised for the first time on federal habeas corpus. The district court denied the claim as procedurally defaulted, and the Ninth Circuit affirmed.[20]

A defaulted claim may be considered if there is cause for the default—defined as an objective factor external to the defense—and resulting prejudice, or if the petitioner is actually innocent.[21] Ineffective assistance of counsel at trial or on appeal may qualify as cause, but Karl had not shown any reason why his lawyer could not have raised the claim on state collateral review, and Walter had waived his ineffectiveness claims in order to keep the same lawyer throughout the proceedings.[22] The Supreme Court denied certiorari on November 2, 1998.

There was another theory that might have been used to argue cause, but it is not discussed in the opinion. This argument is best illustrated by the Supreme Court case of *Strickler v. Greene*.[23] The prosecution's failure to disclose material inculpatory evidence in its possession is a Due Process violation, and continued failure to disclose can be cause for default of that claim as to any defaults occurring prior to the time defense gains knowledge of the evidence.[24] By analogy, the defense could argue that the failure to give the advisement required by the Vienna Convention is both a violation and a cause for not raising it. The weak point of this argument is that defense counsel is not precluded from raising the issue, advisement or no advisement. The underlying fact of defendant's citizenship is equally accessible to the defense, if not more so, and the Vienna Convention itself is a matter of law. The reason there are so many defaulted claims, of course, is that most American criminal defense lawyers, like most police departments, never heard of the Vienna Convention before the mid-1990s.

On March 2, 1999, the day before the scheduled execution of Walter LaGrand, and seven years after it learned of the case, Germany filed an action in the ICJ. That court issued an order stating that: "The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings."[25] The ICJ issued this order sua sponte and with no opportunity for the United States to respond.[26] Germany then sought to invoke the Supreme Court's original jurisdiction, and requested a stay to enforce the ICJ's order. The High Court declined 7 to 2, noting both the tardiness of the request and the jurisdictional problems. In decisions before and since, the Supreme Court has held that a stay should be denied when a known claim is held until the eve of execution and then filed with a demand that the execution be further stayed until the claim can be litigated.[27] The Court's refusal to assist in enforcing the ICJ's provisional remedy order may be an implicit rebuke of that court for issuing the order in such circumstances.

Unlike Paraguay, Germany did not drop its ICJ suit after the defendant was executed. The ICJ's opinion addressed many issues, but the most important was its discussion of the procedural default rule:

> By [the] time [Germany was able to provide assistance], however, because of the failure of the American authorities to comply with their obligation under Article 36, paragraph 1(b), the procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences other than on United States constitutional grounds. As a result, although United States courts could and did examine the professional competence of counsel assigned to the indigent LaGrands by reference to United States constitutional standards, the procedural default rule prevented them from attaching any legal significance to the fact, *inter alia*, that the violation of the rights set forth in Article 36, paragraph 1, prevented Germany, in a timely fashion, from retaining private counsel for them and otherwise assisting in their defence as provided for by the Convention.[28]

If assistance from the German Consulate really would have made a difference, nothing stopped the LaGrands' attorneys from requesting such assistance themselves. The Ninth Circuit reviewed Karl LaGrand's ineffectiveness claim on the merits, and nothing stopped him from claiming that the failure to seek assistance was ineffective. The ICJ was unwilling to see the right to effective assistance as cushioning the procedural default rule the way the Supreme Court did in *Carrier*. Because the Vienna Convention claim itself was defaulted before the consulate had actual notice, and the violation itself was not recognized as

cause, the ICJ held that the procedural default rule as applied to the case failed the requirement that local rules must enable full effect to be given to the purposes of Article 36.

The Avena Case

Mexico is the foreign country with the largest number of citizens on death row in America, by a wide margin. In 2003, Mexico filed an ICJ action on behalf of fifty-four of its nationals. The ICJ issued its decision the following year, by which time two of the cases had been otherwise resolved. Although the decision was hailed as a defeat for the United States, the ICJ in fact decided many important points in the United States' favor.

Mexico's farthest-reaching claim was that a simple Vienna Convention violation alone required vacating all fifty-two of the remaining convictions and sentences. The ICJ rejected this contention.[29] The requirement of "reparation" requires only that each case be examined for prejudice actually caused by a violation, and that a remedy be provided in such an event.[30]

The claim that all statements and confessions taken prior to notification of the consulate be excluded on any retrial was also soundly rejected. Only a causal connection between the violation and the obtaining of the statement would warrant such exclusion.[31] Further, the ICJ's ruling on the timing of notification of the consulate guaranteed that there would rarely be a causal connection.

Obviously, there is no causal connection when the statement or confession precedes the violation. Article 36, paragraph 1(b), requires that the arrestee be informed of his rights "without delay," and if he requests notification, the consulate must be notified "without delay."[32] The ICJ rejected the claim that notice to the arrestee necessarily precedes interrogation.[33] During preparation of the Convention, suggested time periods for notification ranged from a minimum of forty-eight hours up to one month, and the ICJ rejected the argument that the adopted term "without delay" meant "'immediately' upon arrest."[34] Without further explanation, however, the ICJ nonetheless found a duty to inform the arrested person as soon as he is learned to be a foreign national or grounds materialize to think he may be.[35] The ICJ goes on to find a violation in the case of an arrestee whose birthplace was stated in the arrest report but who was informed of these rights forty hours later.[36] However, there is no comparable requirement of immediacy regarding actually notifying the consulate:

> Mr. Hernández (case No. 34) was arrested in Texas on Wednesday 15 October 1997. The United States authorities had no reason to believe he might have American citizenship. The consular post was notified the following Monday, that is five days (corresponding to only three working days) thereafter. The Court finds that, in the circumstances, the United States did notify the consular post without delay, in accordance with its obligation under Article 36, paragraph 1 (b).[37]

Unlike the *Miranda* rule, the Vienna Convention notification provisions were not drafted with interrogation in mind. "[D]uring the Conference debates on this term, no delegate made *any connection* with the issue of interrogation."[38] Unlike a request for counsel under *Miranda*, there is no requirement under *Avena* to refrain from interrogation until a request for consular notification has been fulfilled.[39] Also unlike *Miranda*, there is no waiver to be made as a condition for interrogation.[40]

Because consular notification is a matter of timing unrelated to the taking of the statement, it is more like the prompt appearance requirement than the *Miranda* requirement. *United States* v. *Mitchell*[41] held that a statement made promptly upon arrest was not rendered inadmissible under *McNabb* v. *United States*[42] by a subsequent violation of the prompt appearance rule. Similarly, if consular notification is not overdue when a statement is taken, the fact that the notification is not made when it later becomes due has no causal connection to the making of the statement, and the subsequent violation is no ground for suppression.

On the question of procedural default, the ICJ largely reiterated what it said in *LaGrand*. It stood by its theory of the violation itself causing the default, noting: "[N]or has any provision been made to prevent its application in cases where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a Vienna Convention violation at trial."[43] Where this was the case, the ICJ held that the United States would have to waive the procedural default to provide a review and reconsideration.

Medellín and the President's Memorandum

The first of the *Avena* 52 to reach the U. S. Supreme Court was Jose Medellín, who was found guilty of murder. In 1993, Elizabeth Pena and Jennifer Ertman, ages sixteen and fourteen, took a shortcut to their homes in Houston, Texas.[44] They encountered a gang called "The Blacks and Whites," one of whom was Medellín, a young man born in Mexico, who had had lived in the United States since he was a small child. The gang subjected the girls to an hour of gang rape and sodomy, then strangled the girls to death to prevent them from identifying the assailants, stomping and kicking their bodies to make sure they were dead. After his arrest, Medellín admitted his substantial participation in the crimes, including personal participation in strangling Elizabeth. He first informed authorities he was born in Mexico several hours after this statement, but was not advised that he had the right to notify the Mexican Consulate.

Medellín made no claim under the Vienna Convention on direct appeal of his sentence, but he raised the claim for the first time in a state habeas petition. The state courts rejected the claim; on federal habeas corpus, the federal district court also rejected the claim, and denied a certificate of appealability.[45] The ICJ decided *Avena* while Medellín's application to the Fifth Circuit for a certificate of appealability was pending. The Court of Appeals also denied a certificate of appealability. It gave two reasons for denying appeal on the Vienna Convention claim. First, the claim was defaulted under *Breard v. Greene*, and, notwithstanding a contrary ICJ ruling, Supreme Court precedent was binding on the Court of Appeals until the Supreme Court overruled it. The panel also held it was bound by a prior panel decision that the Vienna Convention created no individually enforceable rights, until that decision was reconsidered by the court en banc.[46] Curiously, the opinion did not mention a third, obvious reason for denying the appeal.

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress changed the standard for certificates of appeal-ability, requiring the petitioner to make a substantial showing of the denial of a *constitutional* right. [47] Whatever rights the treaty in question may confer, in the end they are treaty rights, not constitutional rights.

The Supreme Court granted certiorari. On the day the briefs of Texas and supporting *amici* were due, President Bush issued a Memorandum for the Attorney General stating:

> I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its inter-national obligations under the decision of the International Court of Justice in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena), 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.[48]

This memorandum, combined with several other obstacles to enforcing the ICJ decision on federal habeas corpus, convinced the Supreme Court to dismiss the writ of certiorari.[49] In addition to the certificate of appealability problem, the rule in *Reed v. Farley* sharply limits the cognizability of non-constitutional claims on federal habeas corpus.[50] Also, the "deference" standard of AEDPA makes very doubtful the ability of a federal habeas court to overturn a state court decision in full accord with Supreme Court precedent at the time of the decision, notwithstanding later legal developments.[51] Finally, there are limitations on habeas relief regarding the creation of new rules and the exhaustion of state remedies.[52] The Court's recitation of barriers to federal habeas relief is dictum and not holding, but it indicates that federal habeas will be of little use as a forum for adjudicating Vienna Convention cases. The focus shifts back to state court.

Sanchez-Llamas, Bustillo, and "Respectful Consideration"

The Supreme Court has issued only one opinion on the merits since *Avena*, in a pair of cases arising from the state courts. In this opinion, the High Court said it would give "respectful consideration" to the views of the ICJ, but that apparently means little more than considering the ICJ's opinion as it would that of any other court and not as a precedent with any particular binding force.

Moises Sanchez-Llamas, a citizen of Mexico, shot and attempted to murder a police officer. He received *Miranda* warnings in both English and Spanish before making incriminating statements, but was not informed of his rights under the Vienna Convention. He moved at trial for the statements to be suppressed, but the trial court denied the motion. The state courts affirmed on appeal.[53]

In the Supreme Court, the Government of Mexico filed a brief in support of Sanchez-Llamas. Six pages of that brief are devoted to the argument that suppression of evidence should be granted as a remedy.[54] But, notably, there is no citation to a case where a court of Mexico has suppressed a statement as a remedy for a Vienna Convention violation—no statement by the Government of Mexico that it has provided such a remedy in the past, and no commitment that it will provide such a remedy in the future. Unless Mexico has achieved 100% compliance with Vienna Convention requirements among its police force, exceedingly unlikely, there are violations, and one would expect to see Mexico's suppression remedy cited in this brief if it existed. The brief submitted by the European Union similarly did not cite a single case in which any of its member nations has suppressed a statement on this ground. There are a few Australian cases suppressing statements, but on closer examination each of these cases suppressed the statement as a result of multiple violations, not just the consular notification problem.[55]

A claim that a treaty requires suppression of a statement under circumstances where *no* other signatory to that treaty would suppress the statement would not be expected to get far, and it did not. "It is implausible that other signatories to the Convention thought it to require a remedy that nearly all refuse to recognize as a matter of domestic law."[56] The Supreme Court lacks any general supervisory authority to impose an exclusionary rule on state courts; so, such a rule could only come from the treaty itself. But the treaty neither contains nor implies any such rule.[57] Somewhat surprisingly, the Court did not mention that the *Avena* decision also rejected any blanket rule of exclusion.

Bustillo's case, on the other hand, presented a direct conflict with *Avena*. Bustillo, a citizen of Honduras, was convicted of murder in a Virginia state court. His defense was that another man, also Honduran, committed the crime. He raised his Vienna Convention claim for the first time on state habeas, claiming that the Honduran Consulate could have been of assistance in locating the other man, who may have fled to Honduras immediately after the crime.[58] The state courts denied the claim on the ground that Bustillo had failed to raise it at trial or on direct appeal.[59]

With the *Breard v. Greene* precedent on point, the primary argument for the defendant was that the ICJ decisions in *LaGrand* and *Avena* required reconsideration. "In a similar vein, several *amici* contend that 'the United States is *obligated* to comply with the Convention, *as interpreted by the ICJ.*' Brief for ICJ Experts 11 (emphases added)."[60] The Supreme Court did not agree with the ICJ experts. While the Court said it would give the ICJ's interpretation "respectful consideration," it denied that the ICJ's decisions were binding precedent, although they may have binding effect in the case actually adjudicated by the ICJ.[61] Treaties are federal laws, and the ultimate responsibility for their interpretation for American courts lies with the Supreme Court, just as it does for federal statutes and the Constitution. The ICJ's decisions on procedural default were erroneous, the Supreme Court said, because they had underestimated the importance of procedural default rules in an adversarial (as opposed to inquisitorial) system.[62] Justice Breyer, dissenting, thought that the ICJ decision should have more respect.[63]

The Last Question

The Supreme Court rejection, in *Bustillo*, of the ICJ's *Avena* decision comes with one important qualification: the Court quoted the statute of the ICJ for the proposition that "[t]he ICJ's decisions have 'no binding force except between the

parties and in respect of the particular case.'"[64] In *Bustillo*, the Court emphasized the phrase "no binding force," but in a case involving one of the death row inmates involved in the *Avena* case, the "except" clause may bear emphasis. The President's memorandum, noted above, is limited to those cases.

The case most likely to bring these issues back to the Supreme Court is the same *Medellín* case the Court considered but dismissed before. Shortly after the President issued his memorandum, (and while the Supreme Court case was still pending), Medellín filed a new state habeas petition with the Texas Court of Criminal Appeals. Texas law allows a successive petition if "the factual or legal basis of the claim was unavailable on the date of the previous application."[65] The Solicitor General of the United States made an unusual appearance in state court, arguing that all of Medellín's other arguments were meritless—neither the Vienna Convention, the Optional Protocol, nor the *Avena* decision by its own force required waiving Texas's procedural default rule—but the President's memorandum did so require.

The Texas Court of Criminal Appeals rejected the argument. Cases on Executive agreements with other countries did not provide a basis for this memorandum, because a unilateral memorandum is not an agreement.[66] The CCA went on to hold, "The Supreme Court's determination about the domestic effect of ICJ decisions—that they are entitled only to 'respectful consideration'—based on its interpretation of the Statute of the ICJ and the United Nations Charter in *Sanchez-Llamas* forecloses any argument that the President is acting within his authority to faithfully execute the laws of the United States."[67]

But this is not quite true. The *Sanchez-Llamas* holding dealt with the non-binding effect of ICJ decisions in cases other than the case actually adjudicated by the ICJ. *Medellín* is distinguishable from *Bustillo* in this regard. The extent to which American courts need to comply with *Avena* in the cases it adjudicated remains an open question.

Medellín filed his certiorari petition in the Supreme Court on January 19, 2007.[68] The issues of presidential power and the role of international law in state court adjudications make the case a strong possibility for Supreme Court review. These questions may well be answered by this time next year.

CONCLUSION

The Vienna Convention appears to be headed back to obscurity as far as the practice of criminal law in the United States is concerned. The primary, if not single, purpose for which it could have been useful at trial—suppressing statements of the defendant—was nullified in *Sanchez-Llamas*. Its usefulness on appeal or habeas corpus when trial counsel does not raise it was greatly diminished by the accompanying *Bustillo* case. When the few dozen cases of the *Avena* inmates are resolved, there may well be little left to litigate.

Endnotes

1 *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 628 (2005) (Scalia, J., dissenting); *see also* Richard A. Posner, *The Supreme Court—Foreword: A Political Court*, 119 Harv. L. Rev. 32, 84-85 (2005).

2 21 U.S.T. 77.

3 Schenk & Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 St. Mary's L. J. 719, 730 (1995).

4 Miranda v. Arizona, 384 U.S. 436 (1966).

5 *See* Schenk & Quigley, *supra* note 3, at 729.

6 *See* Yakus v. United States, 321 U.S. 414, 444 (1944).

7 *See* Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977).

8 *See* Schlup v. Delo, 513 U.S. 298, 321 (1995).

9 *See* Murray v. Carrier, 477 U.S. 478, 496 (1986).

10 *See* Breard v. Commonwealth, 445 S.E.2d 670, 673-74 (Va. 1994).

11 *See* Breard v. Greene, 523 U.S. 371, 373 (1998).

12 *See id.* at 374-75.

13 *See id.* at 375.

14 *See id*. at 375-76.

15 *See id*. at 375.

16 *See id.* at 378.

17 *See* Case Concerning Vienna Convention on Consular Relations (Para. v. U.S.) 1998 I.C.J. 426 (Order of Nov. 10).

18 *See* State v. LaGrand, 734 P.2d 563 (Ariz. 1987).

19 *See* LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 477, ¶ 22 (*hereinafter* "LaGrand ICJ").

20 *See* LaGrand v. Stewart, 133 F.3d 1253 (9th Cir. 1998).

21 *See id*. at 1261.

22 *See id*. at 1262.

23 527 U.S. 263 (1999).

24 *See id*. at 283.

25 LaGrand ICJ, ¶¶ 30-32.

26 *See* Federal Republic of Germany v. United States, 526 U.S. 111 (1999) (per curiam).

27 *See* Gomez v. United States District Court, 503 U.S. 653, 654 (1992); Hill v. McDonough, 126 S. Ct. 2096, 2104 (2006).

28 LaGrand ICJ, ¶ 91.

29 Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Judgment of Mar. 31) (Avena), ¶¶ 126-27.

30 *See id*. ¶¶ 121-23.

31 *Id*. ¶¶ 119-121.

32 *See* Avena, *supra* note 29, ¶50.

33 *Id*. ¶87.

34 *Id*. ¶85.

35 *Id*. ¶88.

36 *Id*. ¶89.

37 *See Avena*, ¶97.

38 *Id.* ¶87 (emphasis added); cf. *Miranda* (deciding admissibility of statements obtained during custodial interrogation).

39 *Avena*, *supra* note 29, ¶87; cf. *Miranda*, at 473-74.

40 Cf. *Miranda*, at 479.

41 322 U.S. 65, 69-70 (1944).

42 318 U.S. 332 (1943).

43 *Avena*, ¶ 113.

44 Medellín v. State, No. 71,997 (Tex. Crim. App. May 16, 1997); Medellín v. Dretke, 371 F.3d 270, 273-274 (5th Cir. 2004); Jennifer Ertman & Elizabeth Pena—Murder Victims, *at* http://www.murdervictims.com/Voices/jeneliz.html (last visited Jan. 12, 2007).

45 Medellín v. Dretke, *supra* note 44, 371 F.3d at 274.

46 *Id*. at 279-280.

47 28 U.S.C. § 2253(c)(2) (emphasis added).

48 George W. Bush, Memorandum for the Attorney General (Feb. 28, 2006), http://www.whitehouse.gov/news/releases/2005/02/20050228 18.html (visited January 12, 2007).

49 Medellín v. Dretke, 544 U.S. 660, 664 (2005).

50 512 U.S. 339 (1994).

51 28 U.S.C. § 2254(d).

52 *Medellín*, 544 U.S. at 664-66.

53 Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2675-76 (2006).

54 *See* Brief for Government of the United Mexican States as Amicus Curiae in Sanchez-Llamas v. Oregon, U.S. Supreme Court No. 04-10566, 24-30.

55 *See* Brief for Criminal Justice Legal Foundation as Amicus Curiae in Sanchez-Llamas v. Oregon, U.S. Supreme Court No. 04-10566, pp. 14-18.

56 *See* Sanchez-Llamas, 126 S. Ct. at 2678.

57 *See id*. at 2679-80.

58 *See id*. at 2676-77.

59 *See id.* at 2682.

60 *Id*. at 2683.

61 *See id*. at 2683-84.

62 *See id*. at 2686.

63 *See id*. at 2703.

64 *Id*. at 2684, quoting Statute of the International Court of Justice, Art. 59, 59 Stat. 1062, T.S. No. 993 (1945) (emphasis omitted).

65 Tex. Code Crim. Proc. art. 11.071, § 5(a)(1).

66 Ex parte Medellín, No. AP-75,207 (Tex. Crim. App. Nov. 15, 2006), paragraph following note 209.

67 *Id*., text accompanying notes 124-125, citing Sanchez-Llamas, 126 S. Ct. at 2684-85.

68 Petition for Certiorari in Medellín v. Texas, U.S. Supreme Court No. 06-984.